

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
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In re

Amendment of Section 73.622(b)  
Table of Allotments,  
Digital Television Broadcast Stations  
(Lubbock, Texas)

MM Docket No. 01-17  
RM-10037

To: Chief, Video Services Division

## PETITION FOR RECONSIDERATION

Panhandle Telecasting Co. ("Panhandle"), licensee of television station KFDD-TV, Amarillo, Texas, by its counsel and pursuant to Section 1.429 of the Commission's Rules, hereby requests that the Commission reconsider its action amending the DTV Table of Allotments in the above-referenced proceeding.<sup>1</sup> By that Report and Order, the Commission substituted DTV Channel 9 for DTV Channel 43 at Lubbock, Texas. The Commission erred, however, by failing to consider Panhandle's mutually exclusive application for a minor change in the licensed facilities of KFDD-TV pending before the Commission. See FCC File No. BPCDT-19991029ABB. Panhandle's pending application seeks an initial construction permit for DTV

<sup>1</sup> In the Matter of Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Lubbock, Texas), Report and Order, MM Docket No. 01-17, RM-10037 (released April 23, 2001). Pursuant to Section 1.429 of the Commission's Rules, petitions for reconsideration must be filed within 30 days from the date of public

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operations and proposes maximized facilities for KFDA-DT that are mutually exclusive with the change to the Table of Allotments made in this proceeding. Pursuant to its recently-established procedures for processing such conflicting proposals, the Commission should have considered the petition for rule making and KFDA-TV's application to be mutually exclusive and issued a public notice providing the parties with a 90-day settlement period. Instead, the Commission simply granted KCBD(TV)'s proposed amendment of the DTV Table of Allotments. Accordingly, consistent with its rules, the Commission must reconsider its action, rescind the allocation of DTV Channel 9 at Lubbock, Texas, and consider these mutually exclusive proposals together.

### **Background**

Cosmos Broadcasting Corporation ("Cosmos"), the licensee of KCBD(TV), Lubbock, Texas operating on NTSC Channel 11, was initially assigned Channel 43 for KCBD(TV)'s digital operations. On April 11, 2000, Cosmos filed a Petition for Rulemaking seeking to amend the DTV Table of Allotments contained in Section 73.622(b) in order to substitute DTV Channel 9 for DTV Channel 43 at Lubbock, Texas. Subsequently, on January 26, 2001, the Commission initiated the above-referenced rule making proceeding by issuing a Notice of Proposed Rule Making proposing to amend the DTV Table of Allotments to reflect this change.<sup>2</sup> The deadline for filing comments in that proceeding was March 19 and the deadline for reply comments was

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notice of the action. Publication occurred in the Federal Register on April 24, 2001, thus this Petition is timely filed.

<sup>2</sup> In the Matter of Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Lubbock, Texas), Notice of Proposed Rule Making, MM Docket No. 01-17, RM-10037 (released January 26, 2001) (hereinafter "Lubbock NPRM").

April 3. By a Report and Order released on April 23, 2001, the Commission granted the amendment of the DTV Table of Allotments and ordered that the change be made to the Commission's rules effective June 7, 2001.<sup>3</sup>

Currently, KFDA-TV operates on NTSC Channel 10 at Amarillo, Texas and has been assigned DTV Channel 9 at Amarillo, Texas for its future digital operations. On October 29, 1999, Panhandle filed an initial construction permit seeking authority to construct the necessary facilities in order to commence digital operations for KFDA-TV. *See* FCC File No. BPCDT-19991029ABB. This application seeks maximized facilities for KFDA-DT and specifies nondirectional operation with an effective radiated power of 62 kilowatts at 466 meters above average terrain from the present KFDA-TV transmitter site. This application remains pending before the Commission.

### **Discussion**

The Commission erred in granting the amendment of the DTV Table of Allotments in this proceeding because it failed to consider KFDA-TV's conflicting DTV maximization application as mutually exclusive with the KCBD(TV) Petition for Rule Making. Panhandle's application for a minor modification of KFDA-TV's DTV facilities, filed in October of 1999, was pending at the Commission prior to Cosmos's submission of its Petition for Rule Making in April 2000. More importantly, the KCBD(TV) Petition for Rule Making was not "cut-off" until the release of the Commission's Report and Order regarding the conversion to DTV.<sup>4</sup> Pursuant

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<sup>3</sup> In the Matter of Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Lubbock, Texas), Report and Order, MM Docket No. 01-17, RM-10037 (released April 23, 2001).

<sup>4</sup> In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order and Further Notice of Proposed Rule

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to the procedures established by that Report and Order, the Petition must be considered mutually exclusive with any conflicting applications for maximized facilities that were pending at that time, which in this case is KFDA-TV's application.

As demonstrated by the Engineering Statement prepared on behalf of Panhandle, attached hereto at Exhibit 1, Cosmos's proposal to allot DTV Channel 9 at Lubbock, Texas conflicts with KFDA-TV's application for maximized DTV facilities. While the allotment facilities proposed for KCBD-DT on Channel 9 comply with the 2 % and 10 % *de minimis* interference criteria outlined in Section 73.623(c) of the Commission's rules with regard to interference caused to other DTV and NTSC television facilities, the Channel 9 allotment facilities fail to comply with the *de minimis* interference criteria with regard to interference received from other stations.<sup>5</sup> Specifically, as detailed in the Engineering Statement, it is predicted that 5.37% of the population to be served by KCBD-DT will receive interference from the facilities proposed in the KFDA-DT maximization application. This clearly exceeds the 2% *de minimis* standard for interference received from an individual station under the Commission's rules. Accordingly, the allotment facilities proposed in the instant rule making should have been considered to be in conflict with the KFDA-DT maximization application and the rule making should not have been granted.

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Making, MM Docket No. 00-39, FCC 01-24, released January 19, 2001 (hereinafter "DTV Report and Order").

<sup>5</sup> 47 C.F.R. § 73.623(c)(2).

In its recent DTV Report and Order reviewing the conversion to digital television, the Commission determined, with regard to pending petitions for rule making for new or modified DTV allotments, that:

...where a Notice of Proposed Rule Making has been adopted and the comment deadline on the petition for rule making has passed, we will consider such petitions as “cut-off” as of the comment deadline. In that case, if there is an earlier-filed pending DTV expansion application that conflicts with the petition, we will consider the petition and application(s) as MX and, once again, follow our above outlined procedures for MX applications. **...If the pending DTV petition has not yet been cut-off as of the adoption date of this Report and Order, then, because we will have cut off all pending DTV expansion applications, we will consider the petition and any conflicting DTV expansion applications as MX and use our above-outlined procedures to resolve them.**<sup>6</sup>

In the instant case, the rule making to modify the DTV Table of Allotments by substituting Channel 9 for Channel 43 at Lubbock, Texas was not issued prior to the adoption of the DTV Report and Order on January 18, 2001. Rather, KCBD(TV)’s Petition for Rule Making was still pending as of the adoption of the DTV Report and Order and is considered cut-off as of January 18, 2001.<sup>7</sup> Accordingly, KCBD(TV)’s petition for rule making is considered mutually exclusive with the conflicting DTV maximization application for KFDD-TV, which was pending since October of 1999. Therefore, pursuant to the DTV Report and Order, the Commission must follow the same procedures it established for dealing with two or more mutually exclusive DTV applications, namely:

The staff will identify via public notice those groups of MX applications that are related either by direct or indirect mutual exclusivities. The applicants will then be permitted a period of time, as discussed below, to resolve their MX situation through engineering solutions or settlement. The applications that remain MX following this settlement period would then be dismissed.<sup>8</sup>

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<sup>6</sup> DTV Report and Order at ¶ 54 (emphasis added).

<sup>7</sup> As stated above, the Lubbock NPRM was adopted January 25, 2001 and released on January 26, 2001.

<sup>8</sup> DTV Report and Order at ¶ 44.

As demonstrated above and in the attached Engineering Statement, KCBD(TV)'s petition for rule making conflicts with the pending application for KFDA-TV. Thus, the Commission's staff should have identified the rule making and the application as mutually exclusive and issued a public notice providing the parties with a 90-day settlement period, rather than simply granting KCBD(TV)'s rule making to change the DTV Table.

The Commission's procedures established in the DTV Report and Order are consistent with the Commission's long-standing policy that mutually exclusive technical proposals must be considered comparatively in order to determine which proposal may be granted. The Supreme Court has held that if the Commission is presented with two or more mutually exclusive applications Section 309 of the Communications Act of 1934, as amended, requires that the Commission undertake a comparison of the conflicting proposals before it grants one of them.<sup>9</sup> The *Ashbacker* case states that the Commission must give consideration to all *bona fide* mutually exclusive applications, something it failed to do in the instant case. Accordingly, the Commission must rescind its amendment of the DTV Table of Allotments, treat the conflicting proposals as mutually exclusive, and follow its established procedures for resolving the situation.

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<sup>9</sup> See Ashbacker Radio Corp. v. FCC, 326 US 327 (1945).

### **Conclusion**

For the reasons set forth above, Panhandle contends that the Commission erred in granting the amendment of the DTV Table of Allotments sought in this rule making. Accordingly, the Commission must rescind its amendment of the DTV Table of Allotments and consider these proposals together under its rules.

Respectfully submitted,

**PANHANDLE TELECASTING CO.**

By:   
David D. Oxenford  
Brendan Holland

Its Attorneys

SHAW PITTMAN  
2300 N Street, NW  
Washington, DC 20037  
(202) 663-8000

Date: May 23, 2001

## **EXHIBIT 1**



**ENGINEERING STATEMENT IN  
SUPPORT OF PETITION  
FOR RECONSIDERATION  
MM DOCKET 01-17  
KCBD-DT - LUBBOCK, TX  
Panhandle Telecasting Co.  
Amarillo, TX**

**May 22, 2001**

**Prepared for: Mr. Mike Lee  
Panhandle Telecasting Co.  
P.O. Box 10  
Amarillo, TX 79105-0010**

**CARL E. SMITH CONSULTING ENGINEERS**

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Roy P. Stype, III

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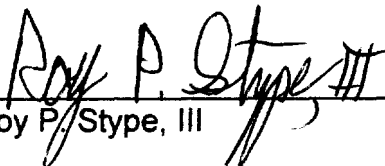
Table 1.0 - OET 69 Interference Studies - KCBD-DT - Lubbock, TX  
(Proposed Channel 9 Facilities/KFDA-DT Maximization  
Application)

ENGINEERING AFFIDAVIT


State of Ohio                    )  
                                      ) ss:  
County of Summit            )

Roy P. Stype, III, being duly sworn, deposes and states that he is a graduate Electrical Engineer, a qualified and experienced Communications Consulting Engineer whose works are a matter of record with the Federal Communications Commission and that he is a member of the Firm of "Carl E. Smith Consulting Engineers" located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio, and that the Firm has been retained by Panhandle Telecasting Company to prepare the attached "Engineering Statement In Support of Petition for Reconsideration - MM Docket 01-17 - KCBD-DT - Lubbock, TX."

The deponent states that the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.

  
\_\_\_\_\_  
Roy P. Stype, III

Subscribed and sworn to before me on **May 22, 2001**.

  
\_\_\_\_\_  
Notary Public

/SEAL/

**NANCY A. ADAMS, Notary Public**  
Residence - Cuyahoga County  
State Wide Jurisdiction, Ohio  
My Commission Expires Sept. 5, 2005

## ENGINEERING STATEMENT

This engineering statement is prepared on behalf of the Panhandle Telecasting Company, licensee of KFDA-TV - Amarillo, Texas. KFDA-TV operates on analog Channel 10 with a nondirectional effective radiated power of 316 kilowatts at 466 meters above average terrain. DTV Channel 9 was allotted to Amarillo in MM Docket 87-268 and paired with analog Channel 10 for use by KFDA-DT. The KFDA-DT DTV allotment specifies operation with a maximum effective radiated power of 20.8 kilowatts at 466 meters above average terrain utilizing a directional antenna to replicate, to the greatest extent possible, the present KFDA-TV Channel 10 analog service area. KFDA-DT has pending an application (BPCDT-19991029ABB) for an initial construction permit for DTV operation. This pending application is a maximization application which specifies nondirectional operation with an effective radiated power of 62 kilowatts at 466 meters above average terrain from the present KFDA-TV transmitter site.

KCBD-TV - Lubbock, Texas operates on analog Channel 11 with a nondirectional effective radiated power of 316 kilowatts at 232 meters above average terrain. DTV Channel 43 was originally allotted to Lubbock in MM Docket 87-268 and paired with analog Channel 11 for use by KCBD-DT. The KCBD-DT Channel 43 DTV allotment specified operation with a maximum effective radiated power of 1000 kilowatts at 232 meters above average terrain utilizing a directional antenna to replicate, to the greatest extent possible, the present KCBD-TV Channel 11 analog service area. In response to a petition for rulemaking filed by the licensee of KCBD-TV, the Report and Order in MM Docket 01-17 substituted DTV Channel 9 for DTV Channel 43 in Lubbock for use by KCBD-DT. This Channel 9 DTV allotment specifies operation with a nondirectional

effective radiated power of 15.0 kilowatts at 232 meters above average terrain. This engineering statement is prepared in support of a petition for reconsideration of the action in MM Docket 01-17 substituting DTV Channel 9 for DTV Channel 43 in Lubbock for use by KCBD-DT.

There is no question that the KCBD-DT Channel 9 allotment facilities proposed in this proceeding fully comply with 2%/10% de minimis interference criteria outlined in Section 73.623(c) of the FCC Rules with regard to interference **caused** to other DTV and analog TV broadcast facilities requiring protection consideration. As outlined below, however, these KCBD-DT Channel 9 DTV allotment facilities fail to comply with these de minimis interference criteria with regard to interference **received** from the facilities proposed in the KFDA-DT maximization application. Thus, the Channel 9 DTV allotment facilities proposed in this proceeding should have been considered to be mutually exclusive with the facilities proposed in the KFDA-DT maximization application and, rather than granting this rulemaking proposal, it should have been processed together with the KFDA-DT maximization application under the procedures established in the Report and Order and Further Notice of Proposed Rulemaking in MM Docket 00-39 for the processing of mutually exclusive DTV proposals.

Detailed interference studies were conducted utilizing the procedures outlined in FCC OET Bulletin 69 to evaluate the predicted interference to the proposed KCBD-DT Channel 9 DTV allotment facilities from the operating facilities proposed in the KFDA-DT maximization application. These interference studies were conducted utilizing the FCC's "FLR" computer program modified to run on a Windows 98/Windows NT platform and recompiled under the Compaq (DEC) Visual Fortran compiler. The version of the

"FLR" program utilized in conducting these studies employed the same 2 kilometer cell size as was employed by the FCC in conducting the initial DTV allotment studies. This implementation of the "FLR" program was run for several stations utilizing the data-bases employed by the FCC to generate the benchmark values contained in Appendix B of the December 18, 1998 Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders and yielded results essentially identical to those found in Appendix B for these stations. Thus, it is felt that this implementation of the "FLR" program faithfully reproduces the results obtained by the FCC in their implementation of this program.

In conducting these interference studies, the "FLR" program was run in the "non-pairwise" mode in order to evaluate the entire area within the predicted noise limited contour for these proposed DTV facilities, which extends just slightly further than the predicted Grade B contour for the KCBD-TV Channel 11 analog facilities. Interfering NTSC stations holding a construction permit were considered to be operating with their construction permit facilities, while interfering NTSC stations not holding a construction permit were considered to be operating with their licensed facilities. Interfering DTV facilities who have not yet filed a construction permit application and authorized or proposed interfering DTV facilities which are based on a checklist application were considered to be operating with their DTV allotment facilities. For interfering DTV facilities which have a pending maximization application or have been authorized operating facilities based on a maximization application, the maximized facilities were considered in these studies only if they reduced the DTV Service population for the proposed KCBD-

DT Channel 9 DTV allotment facilities below the value which occurs when the same station's DTV allotment facilities are considered.

The results of these studies are tabulated in Table 1.0. This table contains a complete listing of the stations which were included in this study and the facilities which were considered for each station included in the study. They also contain the output of the "FLR" program both with the KFDA-DT DTV allotment facilities and with the facilities proposed in the KFDA-DT maximization application. As shown in this table, the facilities proposed in the KFDA-DT maximization application will result in new interference to 5.37% of the population predicted to receive interference free noise limited service from the proposed KCBD-DT allotment facilities when the KFDA-DT DTV allotment facilities are considered. Since this exceeds the 2% de minimis interference level permitted from an individual station by Section 73.623(c) of the FCC Rules, the Channel 9 DTV allotment facilities proposed in the KCBD-DT rulemaking petition should have been considered to be mutually exclusive with the KFDA-DT maximization application. The Report and Order in this proceeding also established a benchmark DTV Service value of 336,000 for the KCBD-DT Channel 9 DTV allotment, which compares quite favorably with the 332,154 value shown in Table 1.0 when the KFDA-DT allotment facilities are considered and confirms that the KFDA-DT maximization application facilities, which would reduce this DTV Service value to 314,319, were not considered in the evaluation of this rulemaking proposal.

Based on the above information, it is obvious that the proposed KCBD-DT DTV allotment facilities should have been considered mutually exclusive with the facilities proposed in the KFDA-DT maximization application. Thus, rather than granting this

rulemaking proposal, it should have been processed together with the KFDA-DT maximization application under the procedures established in the recently released Report and Order and Further Notice of Proposed Rulemaking in MM Docket 00-39 for the processing of mutually exclusive DTV proposals.



TABLE 1.0

OET 69 INTERFERENCE STUDIES  
 KCBD-DT - LUBBOCK, TX  
(PROPOSED CHANNEL 9 FACILITIES/KFDA-DT MAXIMIZATION APPLICATION)  
 Panhandle Telecasting, Inc.  
 Amarillo, TX

STATION BEING STUDIED

<u>Call</u>	<u>Location</u>	<u>Channel</u>	<u>Mode</u>	<u>Status</u>	<u>File Number</u>
KCBD-DT	Lubbock, TX	9	DTV	RM	BPRM-20000602ABF

STATIONS CONSIDERED IN STUDIES

<u>Call</u>	<u>Location</u>	<u>Channel</u>	<u>Mode</u>	<u>Status</u>	<u>File Number</u>
KOBR	Roswell, NM	8	NTSC	Licensed	BLCT-197
KRBC-TV	Abilene, TX	9	NTSC	Licensed	BLCT-1577
KWES-TV	Odessa, TX	9	NTSC	Licensed	BLCT-19850708KJ
KPCB-DT	Snyder, TX	10	DTV	Allotment	
KFDA-DT	Amarillo, TX	9	DTV	Applicant	

STUDY RESULTS FOR KFDD-DT ALLOTMENT FACILITIES

	POPULATION	AREA (sq km)
within Noise Limited Contour	356741	26594.5
not affected by terrain losses	356205	25627.7
lost to NTSC IX	13425	3021.2
lost to additional IX by ATV	10626	1385.7
lost to ATV IX only	14068	2553.9
lost to all IX	24051	4406.9

STUDY RESULTS FOR KFDD-DT APPLICATION FACILITIES

	POPULATION	AREA (sq km)
within Noise Limited Contour	356741	26594.5
not affected by terrain losses	356205	25627.7
lost to NTSC IX	13425	3021.2
lost to additional IX by ATV	28461	2557.9
lost to ATV IX only	40507	4531.8
lost to all IX	41886	5579.1

TABLE 1.0(cont'd)

OET 69 INTERFERENCE STUDIES  
KCBD-DT - LUBBOCK, TX  
(PROPOSED CHANNEL 9 FACILITIES/KFDA-DT MAXIMIZATION APPLICATION)

SUMMARY OF STUDY RESULTS

	<u>KFDA-DT Allotment</u>	<u>KFDA-DT Application</u>	<u>Increase/(Decrease)</u>
DTV Service	332,154	314,319	(17,835)
Percent Loss(Gain)*	0.00%	5.37%	5.37%

\*Percent Loss calculations are based on a benchmark DTV Service value of 332,154 for the proposed Channel 9 facilities, as extracted from the data contained in this table.

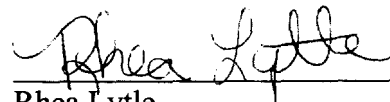
***CERTIFICATE OF SERVICE***

I, Rhea Lytle, a secretary in the law firm of Shaw Pittman, do hereby certify that true copies of the foregoing "*Petition for Reconsideration*" were sent via U.S. Mail this 23rd day of May, 2001, to the following:

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\_\_\_\_\_  
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***\*VIA HAND DELIVERY***